BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
WILLIAM F. AND)
DOROTHY M. JOHNSON)

Appearances:

For Appellants: Harry R. Hibbs
Attorney at Law

For Respondent: James C. Stewart
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of William F. and Dorothy M. Johnson against proposed assessments of additional personal income tax in the amounts of $2,263.90, $63.91 and $56.42 for the years 1969, 1970 and 1971, respectively. Dorothy M. Johnson is involved in the appeal solely because joint returns were filed during the years in question. Therefore William F. Johnson will be referred to as appellant.

Appeal of William F. and Dorothy M. Johnson

The issue is whether a decedent spouse's interest in property, purchased by the decedent and her husband with community funds but held by them as joint tenants, acquires a new basis as of the date of the decedent spouse's death.

Appellant was married to Helen Louise Johnson from 1957 to 1967. During the course of the marriage he and his wife purchased, using community funds, 1600 shares of the common: stock of Microdot, Inc. They elected to hold this stock as joint tenants. In December 1967 Mrs. Johnson died, and ownership of the stock thereupon vested entirely in appellant. The report of the California inheritance tax appraiser reveals that no inheritance tax was due on account of the termination of the joint tenancy.

'In 1968 Microdot declared a three-for-two stock split. As a result appellant received an additional 800 shares of the company's stock, for a total of 2,400 shares. In 1969 appellant sold 2,000 of these shares.

On his California personal income tax return for the year 1969, appellant reported the proceeds from the sale of the Microdot stock in the following manner. First, 900 of the shares were treated as part of appellant's one-half interest in the original joint tenancy, as increased by the stock split. Appellant used the **adjusted cost of these shares as their basis.** The remaining 1,100 shares were claimed to represent stock received upon the termination of the joint tenancy. As the basis of these shares, appellant used their fair market value on the date of Mrs. Johnson's death, adjusted to reflect the stock split. Reporting the sale in this manner resulted in a net long-term capital loss, a portion of which appellant carried over onto his 1970 and 1971 returns. After an audit, however, respondent determined that none of the Microdot stock qualified for a new basis as of the date of Mrs. Johnson's death, and that appellant had therefore realized a net gain on the sale. Whether this determination was correct .is the sole issue presented in this appeal.

Appellant relies primarily on former subdivision (g) of Revenue and Taxation Code section 18045 (hereinafter referred to as "subdivision (g)"). This section, together

with the other relevant provisions of the Revenue and Taxation Code, is set out in the margin.[1] Appellant contends that Mrs. Johnson's interest in the joint tenancy stock was required to be included in determining the value of her estate under sections 13303 and 13671, and that subdivision (q) therefore authorizes a date-of-death basis for that portion of the stock. Respondent, on the other hand, contends that subdivision (q) does not apply because none of the Microdot stock was in fact required to be included in determining the value of Mrs. Johnson's estate.

1/ Throughout this opinion, all statutory references are to the Revenue and Taxation Code, unless otherwise noted. While some of these statutes have recently been amended, we shall refer to the Revenue and Taxation Code sections as they read during 1967, the year in which Mrs. Johnson died. In pertinent part, the relevant sections are:

> Section 18044: Except as otherwise provided in this article, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall... be the fair market value of the property at the time of its acquisition.
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> Section 18045: For purposes of section 18044, the following property shall be considered to have been acquired from or to have passed from the decedent:
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> (a) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;
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> * * *
>
> (q) In the case of decedents dying after December 31, 1954, property acquired from the decedent by reason of death, form of ownership, or other conditions... if by reason thereof the property is required to be included in determining the value of the decedent's estate under Division 2, Part 8 of the Revenue and Taxation Code [Rev. & Tax. Code, §§ 13301-14902]....

(continued on next page)

We agree with respondent. Under sections 13303 and 13671, joint tenancy property is generally required to be included in full in the decedent's estate, except insofar as the surviving joint tenant may show that the property originally belonged to him and was not acquired from the decedent for less than an adequate and full consideration. Section 13671.5, however, provides a special rule for joint tenancy property held by a husband and wife and having its source in the community property of the marriage. Such property is considered community property

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Section 13303: "Estate" or "property" means the real or personal property or interest therein of a decedent or transferor....

Section 13551: Upon the death of a spouse:

(a) None of the community property transferred to a spouse is subject to this part, except [certain powers of appointment].

Section 13671: Where two or more persons hold property in joint tenancy...upon the death of one the right of each survivor to the immediate ownership or possession and enjoyment of the property is a transfer subject to this part to the same extent as though the property had belonged absolutely to the decedent and been devised or bequested by him to the survivor, except any such part thereof as may be proved by the survivor to have originally belonged to him and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth. Where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by the survivor from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excluded only such part of the value of such property as is proportionate to the consideration furnished by such survivor.

Section 13671.5: Where a husband and wife hold property in joint tenancy...and such property had its source in community property of the marriage of the husband and wife, then upon the death of either of them, such property shall be treated for inheritance tax purposes as if it were community property of the husband and wife.

for inheritance tax purposes. Furthermore, under section 13551, community property transferred to the surviving spouse is not subject to the Inheritance Tax Law. Because of sections 13671.5 and 13551, none of the Microdot stock was subject to the Inheritance Tax Law when Mrs. Johnson died. Therefore none of the stock was required to be included in determining the value of her estate for purposes of subdivision (g). (FTB LR 330, July 30, 1968; cf. Appeal of Estate of Philip Rosenberg, etc., Cal. St. Bd. of Equal., Aug. 19, 1975, modified, Feb. 2, 1976.)

Appellant next contends that he acquired Mrs. Johnson's interest in the Microdot stock by "inheritance," and that the stock therefore qualifies for a new basis under subdivision (a) of section 18045 (hereinafter referred to as "subdivision (a) "). Upon the death of a joint tenant, however, the surviving joint tenant acquires the decedent's interest in the property by right of survivorship, and "not through inheritance or any other type of succession after death." (Goldberg v. Goldberg, 217 Cal. App. 2d 623, 628 [32 Cal. Rptr. 93]; see also Helen G. Carpenter, 27 13.T.A. 282, appeal dismissed, 68 F.2d 995.) Consequently, subdivision (a) does not apply to a decedent's interest in property held in joint tenancy.

Appellant points out, however, that subdivision (a) generally does apply to a decedent spouse's interest in community property. This is because, upon the death of a spouse, the heirs may be said to acquire the decedent's one-half interest in such property by "bequest, devise, **or** inheritance." Since the Microdot stock was purchased with community funds, appellant argues, it should be treated as community property rather than joint tenancy property for purposes of subdivision (a). For the reasons expressed below, we disagree.

In support of his position, appellant argues that section 13671.5 evidences a legislative intent to treat community-source joint tenancy property and community property similarly. By its terms, however, section 13671.5 applies only "for inheritance tax purposes." There is no comparable provision in the Personal Income Tax Law. Accordingly, we are unable to conclude that the Legislature intended to treat community-source joint tenancy property as community property for income tax purposes.

Appellant also contends that there is "no recognizable difference" between community-source joint tenancy property and community property, and that it is therefore unconstitutional to treat those two classes of property differently. It is the settled policy of this board to abstain from deciding constitutional questions in appeals involving proposed assessments of additional tax. This policy is based on the lack of any specific statutory authority allowing respondent to obtain judicial review of our decisions in such cases, and our belief that judicial review should be available for questions of constitutional importance. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1370.) In any event, we find little merit in appellant's argument. When spouses elect to hold property in joint tenancy rather than as community property, they acquire the rights and duties of joint tenants, in particular the right of survivorship. (See Goldberg v. Goldberg, supra.) There is nothing in either the California or federal Constitution which requires that such an election be iqnored for income tax purposes.

For the above reasons, we sustain respondent's action.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

Appeal of William F. and Dorothy M. Johnson

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of William F. and Dorothy M. Johnson against proposed assessments of additional personal income tax in the amounts of $2,263.90, $63.91 and $56.42 for the years 1969, 1970 and 1971, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 6th day of October, 1976, by the State Board of Equalization.

William M. Bennett, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Executive Secretary